IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ELOUISE PEPION COBELL, et al.,

Plaintiffs-Appellees,

v. No. 05-5269

GALE A. NORTON,
Secretary of the Interior, et al.,

Defendants-Appellants.

APPELLANTS' RESPONSE IN OPPOSITION TO APPELLEES' EMERGENCY MOTION FOR LEAVE TO FILE SUR-REPLY BRIEF

Defendants-appellants, the Secretary of the Interior, et al., respectfully submit this response in opposition to plaintiffs-appellees' emergency motion for leave to file a sur-reply brief of ten pages. Because plaintiffs have identified no circumstances warranting an additional brief, the motion should be denied.

BACKGROUND

1. This litigation has given rise to many appeals.[1] On July 12, 2005, the district court issued the order that is the subject of this appeal. The July 12 order compels Interior to include, in all written communications with class members, a notice warning trust beneficiaries to keep in mind the

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[1] See Cobell v. Norton, 428 F.3d 1070 (D.C. Cir. 2005); Cobell v. Norton, 392 F.3d 461 (D.C. Cir. 2004); Cobell v. Norton, 391 F.3d 251 (D.C. Cir. 2004); In re Brooks, 383 F.3d 1036 (D.C. Cir. 2004); Cobell v. Norton, 334 F.3d 1128 (D.C. Cir. 2003); and Cobell v. Norton, 240 F.3d 1081 (D.C. Cir. 2001). See also In re Norton, No. 03-5288 (oral argument heard October 14, 2005); Cobell v. Norton, No. 05-5388 (opening brief filed January 11, 2006).

"questionable reliability" of Interior's trust information when making decisions related to trust assets. Cobell v. Norton, 229 F.R.D. 5, 24 (D.D.C. 2005). This Court granted an emergency stay of the order pending appeal, and briefing was completed on January 20, 2006.

The opinion accompanying the July 12 order set out a comprehensive moral and ethical indictment of the Department of the Interior and its officers and employees. In light of the extraordinary statements contained in the July 12 opinion, the government moved to have this case assigned to a different district court judge pursuant to 28 U.S.C. § 2106. The government filed that motion in Cobell v. Norton, No. 05-5068, which was scheduled for argument on September 16, 2005.

Plaintiffs opposed the motion, urged that it should be heard by the panel that would hear the appeal from the July 12 order, and moved for sanctions. The panel in No. 05-5068 transferred the assignment motion and the sanctions motion to the panel that would hear the appeal from the July 12 order.

2. At the outset of briefing in this appeal, plaintiffs moved to extend the word limit for their brief to 24,000 words. See Plaintiffs-Appellees' Motion For Leave To Exceed Word Limitations. Plaintiffs noted, among other things, that they would need to address the issue of sanctions. See id. at 2-3. They alternatively suggested that if the Court did not extend the word limit, it should preclude further briefing on the government's assignment motion and plaintiffs' sanctions motion.

See id. at 3 n.4. This Court denied plaintiffs' motion for leave to exceed the word limit, and directed the parties to address the issues presented by the assignment and sanctions motions in the briefs rather than to incorporate them by reference. See 12/6/2005 Order.

Accordingly, the government's opening brief addressed both its appeal from the July 12 order and the issue of assignment to a different district court judge. Plaintiffs' brief addressed these issues, and also devoted approximately five pages to renewing their request for sanctions.

The government's reply brief responded to the sanctions request in approximately two pages.

PLAINTIFFS' MOTION FOR LEAVE TO FILE A SUR-REPLY BRIEF SHOULD BE DENIED.

Plaintiffs recognize that the appellate rules make no provision for the filing of a sur-reply brief. No ground exists for permitting an exceptional filing here.

Plaintiffs identify no particular reason for allowing an extraordinary sur-reply. Their principal point seems to be that an appellee should be allowed to file a sur-reply with regard to issues introduced in an appellee's brief. But appellees are generally free to introduce significant arguments in their briefs, as when they move for affirmance on grounds rejected or not even considered by the district court. As plaintiffs recognize, the appellee does not thereby acquire the right to file a sur-reply on such issues. See Plaintiffs'-Appellees'

Emergency Motion For Leave To File Sur-Reply Brief, at 3 ("'an appellee presenting alternative grounds for affirmance'" must proceed "'without the * * * advantage of being able to file a reply brief'") (quoting Crocker v. Piedmont Aviation, Inc., 49 F.3d 735, 739 (D.C. Cir. 1995)).

Plaintiffs do not advance their argument by noting that an appellant must raise its challenges to a district court ruling in its opening brief. See Motion at 4 (citing Herbert v. National Academy of Sciences, 974 F.2d 192 (D.C. Cir. 1992)). That rule prevents a situation in which the appellee has no opportunity whatsoever to address an issue in writing. Id. at 196. It does not preclude the appellant from responding in its reply brief to an issue introduced by the appellee.[2]

A sur-reply, although strongly disfavored, might be appropriate in rare cases, but this is not such a case. Indeed, plaintiffs' sur-reply is not really a "reply" at all. Plaintiffs ask for ten pages in which to "reply" to approximately two pages in the government's brief, which, in turn, responded to approximately five pages in plaintiffs' brief. Plaintiffs' request is nothing more than an attempt to circumvent this Court's previous denial of their motion to extend the word limit for their brief.

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[2] Plaintiffs' suggestion that the Court should "strike" the two pages of the government's reply brief that respond to plaintiffs' sanctions request, Motion at 4 n.5, is thus particularly difficult to fathom.

Inasmuch as the government devoted only two pages of its brief to the issue of sanctions, it is hardly surprising that plaintiffs can provide no specific justification for a sur-reply. Although plaintiffs profess a desire to continue their discussion about the significance of Brown v. Board of Education in this litigation, see Motion at 2, the government's discussion of that case comprised one sentence. Moreover, inasmuch as the issue of sanctions (and even the relevance of Brown) had already been the subject of plaintiffs' sanctions motion and the government's response, plaintiffs cannot plausibly argue that they renewed their arguments with no inkling of the government's position.

In sum, the governing rules make no provision for a sur-reply, and plaintiffs provide no basis for a departure from those rules.

CONCLUSION

For the foregoing reasons, plaintiffs' motion for leave to file a sur-reply brief should be denied.

Respectfully submitted,

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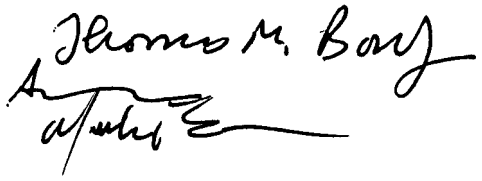

JANUARY 2006

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of January, 2006, I caused copies of the foregoing response to be sent to the Court and to the following by hand delivery:

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